No. 75-1704

In the Supreme Court of the United States

OCTOBER TERM, 1975

MARTIN R. HOFFMANN, SECRETARY OF THE ARMY,

v.

LOUIS J. FIOTO, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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OPINION BELOW

The opinion of the district court (App. A, *infra*), as amended (App. B, *infra*), is not yet reported.

JURISDICTION

The judgment of the three-judge district court, holding unconstitutional and in effect enjoining enforcement of 10 U.S.C. 1331(c) as it applies to the named appellee and the class he represents, was entered on January 26, 1976 (App. C, *infra*). A notice

of appeal to this Court was filed on February 25, 1976 (App. D, *infra*). On April 19, 1976, Mr. Justice Marshall extended the time for docketing the appeal to and including May 25, 1976. The jurisdiction of this Court is conferred by 28 U.S.C. 1252 and 1253.

QUESTIONS PRESENTED

1. Whether Congress, when it established in 1948 a program of retirement pay for nonregular military service, acted unconstitutionally in excluding from eligibility for such retirement pay individuals who had served 20 years in nonregular military service since August 16, 1945, but who had been members of the National Guard or the Reserve prior to August 16, 1945, and had failed to serve on active duty during either World War.

2. Whether, in any event, the district court had authority to enter a judgment against the Secretary of the Army for retired pay retroactive to the date of retirement. (This question is discussed *infra*, at p. 12, n. 11.)

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment to the United States Constitution in pertinent part provides:

> No person shall * * * be deprived of life, liberty, or property, without due process of law.

10 U.S.C. 1331 provides in pertinent part:

> (a) Except as provided in subsection (c), a person is entitled, upon application, to retired pay computed under section 1401 of this title, if—
>
> (1) he is at least 60 years of age;
>
> (2) he has performed at least 20 years of service computed under section 1332 of this title;
>
> (3) he performed the last eight years of qualifying service while a member of any category named in section 1332(a)(1) of this title, but not while a member of a regular component, the Fleet Reserve, or the Fleet Marine Corps Reserve; and
>
> (4) he is not entitled, under any other provision of law, to retired pay from an armed force or retainer pay as a member of the Fleet Reserve or the Fleet Marine Corps Reserve.
>
> * * * * *
>
> (c) No person who, before August 16, 1945, was a Reserve of an armed force, or a member of the Army without component or other category covered by section 1332(a)(1) of this title except a regular component, is eligible for retired pay under this chapter, unless he performed active duty after April 5, 1917, and before November 12, 1918, or after September 8, 1940, and before January 1, 1947, or unless he performed active duty (other than for training) after June 26, 1950, and before July 28, 1953.

STATEMENT

The Army and Air Force Vitalization and Retirement Equalization Act of 1948, 62 Stat. 1081, as amended, 10 U.S.C. 1331 *et seq.*, established retired pay for reservists and national guardsmen who meet

certain age and service requirements. In general, individuals who have reached the age of sixty and have accumulated twenty years of eligible service are entitled to retired pay under the Act. 10 U.S.C. 1331 (a). However, 10 U.S.C. (1952 ed., Supp. IV) 1331 (c) excluded from eligibility any person "who, before August 16, 1945, was a Reserve of an armed force, or a member of the Army without component or other category covered by section 1332(a)(1) of this title except a regular component * * *unless he performed active duty after April 5, 1917, and before November 12, 1918, or after September 8, 1940, and before January 1, 1947." 70A Stat. 102; see 62 Stat. 1087-1088.

Thus, the Act excluded from eligibility for retired pay individuals who had been members of the non-regular military service (*i.e.*, Army Reserve, Army National Guard, etc.) prior to August 16, 1945, but had failed to serve on active duty during either World War. The Act was subsequently amended to remove the eligibility bar for such individuals if they had later served on active duty during the Korean War. 72 Stat. 702, 10 U.S.C. 1331(c).

The named appellee, Louis J. Fioto, served in the United States Army National Guard for seven years prior to 1945 (from 1933 to 1940), but he did not serve on active duty during either World War.[1] Fioto

[1] The opinion of the district court states that Fioto's failure to serve in World War II was "[d]ue to injuries resulting from an automobile accident in 1941 * * *" (App. A, *infra*, p. 2a). There is, however, no support for this statement in the record. Furthermore, Fioto's Army personnel record,

rejoined the National Guard after the end of World War II and served for slightly more than twenty years, until 1967, but he did not serve on active duty during the Korean War.

Fioto applied to the Department of the Army for retired pay benefits in 1967 and again in 1974, but on both occasions his application was denied on the basis of 10 U.S.C. 1331(c). After the second denial, Fioto commenced this action in the United States District Court for the Eastern District of New York, on behalf of himself and others similarly situated, seeking injunctive relief and a money judgment for retired pay retroactive to the date of his retirement, on the ground that the eligibility bar of 10 U.S.C. 1331(c) denies due process. The action was certified as a class action pursuant to Rule 23, Fed. R. Civ. P.,[2] and a three-judge court was convened under 28 U.S.C. 2282.

which was not introduced in evidence but relevant parts of which we have lodged with the Clerk of the Court, shows that when Fioto re-enlisted in the National Guard in 1947, and periodically thereafter, he attested, subject to the sanctions imposed by 18 U.S.C. 1001, that he had never been rejected for military service for medical reasons and had never been hospitalized (except in 1949) as a result of an accident. Moreover, an alleged automobile accident in 1941 would not explain Fioto's withdrawal from the National Guard in 1940.

[2] The class was defined as (App. B, *infra*, p. 9a):

> [A]ll "persons at least 60 years of age who have performed 20 years of service computed under 10 U.S.C. § 1332 since August 16, 1945 and otherwise are entitled to retired pay for non-regular military service, except that before August 16, 1945 they were a Reserve of an

On cross-motions for summary judgment, the district court held that, as applied to Fioto and the class he represents, 10 U.S.C. 1331(c) violates the requirements of equal protection inherent in the Due Process Clause of the Fifth Amendment (App. A, *infra*, p. 5a). The court reasoned that the statutory eligibility bar "bears no rational relationship to the legislative objectives which led to the [Act]" (App. A, *infra*, p. 5a).[3]

The court ordered that Fioto "henceforth be placed on the Army's retirement rolls" (App. C, *infra*, p. 12a) and be paid "all retirement benefits which have accrued since his honorable discharge which have been denied him under the Army's erroneous ruling * * *" (App. C, *infra*, p. 12a). The court further ordered the Secretary to place all members of the class on the Army's retirement rolls and to grant them retirement benefits (App. C, *infra*, p. 12a).[4]

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armed force or a member of the Army without component and did not perform active duty after April 15, 1917 but before November 12, 1918, or after September 8, 1940 and before January 1, 1947, or after June 26, 1950 but before July 28, 1953, and therefore were disqualified from Retired Pay Benefits by virtue of 10 U.S.C. § 1331(c)."

[3] The court determined that Congress' purpose in establishing a program of retired pay for nonregular military service was to create "an incentive to continued service" and thereby "to limit the anticipated post-war exodus from the Reserves and National Guard" (App. A, *infra*, p. 6a).

[4] Appellee Fioto is currently being paid under the court's order, but the court has stayed its order with respect to the class.

THE QUESTION IS SUBSTANTIAL

This appeal presents an important question concerning the extent of Congress' constitutional power to allocate military retirement pay.[5] In holding that Congress lacked power to exclude from eligibility for such pay individuals who had served 20 years in nonregular military service since August 16, 1945, but who had been members of the National Guard or the Reserve prior to August 16, 1945, and had failed to serve on active duty during wartime, the court seriously misapplied the Due Process Clause.

Congress' principal purpose in establishing retired pay for nonregular military personnel was to maintain and enhance the Nation's combat readiness by inducing new recruits to enlist in the National Guard and Reserve after World War II, and by providing an incentive for such recruits to serve a full twenty years. See S. Rep. No. 1543, 80th Cong., 2d Sess. 9 (1948); Hearings on H.R. 2744 before the Senate Committee on Armed Services, 80th Cong., 2d Sess. 29 (1948). In addition, Congress wished to show the Nation's gratitude to those reservists and guards-

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[5] Although the district court's order is addressed to the Secretary of the Army, the holding of unconstitutionality affects the other military branches as well. The Department of the Army estimates that the cost of providing retired pay to former members of the Army National Guard and Air National Guard affected by this case would be $10.8 million. Estimates are not available with respect to the cost of paying such benefits to similarly situated former members of the Army, Air Force, or Navy Reserve. In addition, the court's order would require substantial expenditures just to identify and locate members of the affected class.

men who had served on active duty during wartime, and its need of their continued services, by providing them with retired pay upon completion of satisfactory service. See Hearings on H.R. 2744, *supra*, at 29.[6]

But there was no basis for any similar show of gratitude to, or of need for the continued services of, those individuals, such as appellee Fioto, who had been in the nonregular military service before or during wartime and had failed to come to the Nation's defense in its time of need. Moreover, since those individuals in the past had not fulfilled the purpose for which a militia or other nonregular military service is maintained, Congress understandably saw no reason to encourage their continued or renewed participation in such service. As Major General John E. Dahlquist, the Deputy Chief of Personnel and Administration of the Army Chief of Staff, advised the Senate Committee on Armed Services (*ibid.*):

> The purpose of reservists was to fight in the war. If he did not fight in the wars we did have, we feel he should not qualify.[7]

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[6] This rationale was further reflected in the 1958 amendment that added service on active duty during the Korean War to the exceptions to the eligibility bar for individuals who had been members of the National Guard or Reserve prior to August 16, 1945. See, *e.g.*, S. Rep. No. 2188, 85th Cong., 2d Sess. 1 (1958).

[7] General Dahlquist outlined the reasons for establishing retired pay for nonregular military service as follows (*ibid.*):

> Our first objective is an incentive for the future.
>
> However, we face this practical situation that we have thousands of men who were responsible for the fact that we were in a position to have a Reserve unit without which we could not have mobilized so that part of the incentive to the future is to show that this Nation at least is grateful to all those men who did something in the past.
>
> The purpose of reservists was to fight in the war. If he did not fight in the wars we did have, we feel he should not qualify.

In thus distinguishing, for purposes of eligibility for retired pay for further service, between individuals who had served on active duty during wartime and those who had not, Congress was making virtually the same distinction that this Court sustained as rational in *Johnson* v. *Robison*, 415 U.S. 361. In *Robison*, Congress had distinguished between military service and alternative civilian service for purposes of eligibility for educational benefits. In upholding this distinction, the Court noted (*id.* at 379):

> * * * [T]he disruptions suffered by military veterans and alternative service performers are qualitatively different. Military veterans suffer a far greater loss of personal freedom during their service careers. Uprooted from civilian life, the military veteran becomes part of the military establishment, subject to its discipline and potentially hazardous duty.

Precisely the same is true of the difference between a reservist or guardsman who was activated into wartime duty and one who, like Fioto, was not.

The distinction between older individuals, such as

Fioto, who had served in the militia prior to 1945, and new recruits also was rational. Congress' overriding purpose in enacting the 1948 Act was to preserve the militia as an effective secondary fighting force that would be available for immediate activation in time of military need. To do this, it was necessary to make the militia attractive to the newer generation of men who had been too young to serve during World War II.

Older individuals like Fioto, who had never seen active wartime duty, were reasonably regarded as being potentially less useful as soldiers in the event of wartime activation. Fioto and the other members of the class he represents offered neither the youth nor the experience Congress presumably sought in post-war militiamen. Accordingly, Congress rationally chose not to furnish them with a retirement-pay incentive for re-enlistment.[8]

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[8] While Congress did not exclude from eligibility for retired pay other older individuals who had not fought in World War II, that fact does not render the classification invalid as to former militiamen who already had once failed to assist the militia in carrying out its basic purpose. Congress could properly consider that history in distinguishing between such former militiamen and other potential recruits. Cf. *Marshall* v. *United States*, 414 U.S. 417. Moreover, in view of the 20 year service requirement (10 U.S.C. 1331(a)(2)) and the provisions for a mandatory retirement age (*e.g.*, 32 U.S.C. 313; National Guard Reg. 600-200, ¶ 2-6(b)(4); see 10 U.S.C. 1331(a)(1)), Congress could reasonably believe that there would be relatively few older individuals who had no pre-1945 nonregular military service (and who had not been affected by the general mobilization during World War II), who could achieve eligibility for retired pay by first enlisting in the militia after 1945.

In short, Congress had no reason to reward members of the appellee class or to encourage their renewed or continued enlistment in the nonregular military service, and for that reason Congress deliberately chose to deny them any such reward or encouragement.[9] Congress correctly believed that that classification was consistent with its objective of establishing and maintaining a peacetime reserve of soldiers willing and able to serve in time of war.[10]

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[9] The district court concluded that Congress had not intended to bar members of the appellee class from eligibility, apparently basing its conclusion upon the statement in Senate hearings by an administration witness that a member of the nonregular military service "would get credit for the points [accumulated during years in which he recieved insufficient points to obtain a full year of credit] if he ultimately got twenty years of service" (App. A, *infra*, p. 7a, quoting from Hearings on H.R. 2744, *supra*, at 70). But that statement was made, as Senator Tydings explicitly noted, on the assumption that the hypothetical reservist or guardsman in question had "served 20 years and served in World War I or II." Hearings on H.R. 2744, *supra*, at 70.

[10] In the district court, appellee Fioto asserted that he had been "found medically unqualified when he attempted to enlist in World War II" (Fioto Br. 10, note), and therefore, implicitly, that his failure to serve had not been due to any unwillingness on his part. There is reason to doubt the correctness of his assertion. See note 1, *supra*. But even if Fioto had been physically unable to serve during the war, and therefore individually fell outside the statutory rationale, that would not render the statute's application to him invalid. A classification "does not offend the Constitution simply because [it] 'is not made with mathematical nicety * * *.'" *Dandridge* v. *Williams*, 397 U.S. 471, 485. Nor can Fioto claim that the operation of the statute is unduly harsh, since

For these reasons, we submit that the exclusion of the appellee class from eligibility for retired pay was rational and should be sustained as constitutional.[11]

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he may be presumed to have known as early as 1948, long before he reached retirement age, that he would be ineligible for retired pay, and he need not have reenlisted thereafter.

[11] But if this Court held to the contrary, it would be appropriate for it to vacate the judgment of the district court and remand the case for reconsideration, in light of the intervening decision in *United States* v. *Testan*, No. 74-753, decided March 2, 1976, of the propriety of the award of retired pay retroactive to the date of retirement. That award in essence constituted a money judgment that was beyond the jurisdiction of the district court to enter in a suit brought against the Secretary. The district courts have power to award monetary relief against the government only to the extent that jurisdiction is conferred over actions against the United States by the Tucker Act, 28 U.S.C. 1346. Moreover, even if the district court would have jurisdiction over an action in which the United States had been joined as a party defendant, there is substantial doubt whether the complaint asserted a claim as to which sovereign immunity had been waived. As this Court had occasion to note in *United States* v. *Testan*, *supra*, slip op. at 6:

> The Tucker Act, of course, is itself only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages.

No Act of Congress created a substantive right in the appellee class to retroactive retired pay; to the contrary, the appellees' objection is that the statute explicitly denies them such pay. In short, insofar as the appellees sought retroactive pay, their suit was one to which the United States had not consented. See *United States* v. *Sherwood*, 312 U.S. 584. Cf. *Edelman* v. *Jordan*, 415 U.S. 651.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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MAY 1976.

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. 75 C 44

LOUIS J. FIOTO, on behalf of himself and all other persons, similarly situated, PLAINTIFFS

—against—

UNITED STATES DEPARTMENT OF THE ARMY, HOWARD CALLAWAY, as Secretary of the Army, DEFENDANTS

OPINION

Before: LUMBARD, Circuit Judge, and BRUCHHAUSEN and BRAMWELL, District Judges.

LUMBARD, Circuit Judge:

Louis J. Fioto, on behalf of himself and all others similarly situated,[1] challenges the constitutionality of 10 U.S.C. § 1331(c) which, in combination with § 1331(a), governs the availability of retirement pay for members of the non-regular military service (i.e., Reserves and National Guard). Pursuant to 28 U.S.C. §§ 2282, 2284 this court was convened to consider plaintiff's non-frivolous claim.

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[1] Judge Bruchhausen, as the convening judge, entered an order on January 12, 1976, certifying plaintiff's action as a class action under the provisions of Rule 23(b)(2), Federal Rules of Civil Procedure.

The facts are undisputed and the parties[2] have filed cross-motions for summary judgment. Fioto served in the Army National Guard for a total of twenty-seven years: from 1933 to 1940 and then again, for over twenty years, from 1947 until he was honorably discharged on December 9, 1967, having reached the mandatory retirement age of sixty.[3] Due to injuries resulting from an automobile accident in 1941 he did not, however, serve during World War II. Nor did he participate in the Korean War since his unit was never called to active duty.

In anticipation of his retirement, plaintiff filed an application for retirement pay with the Department of the Army on September 5, 1967. Fioto maintains, and the Army does not deny, that he satisfied each of the requirements set forth in § 1331(a): (1) he was sixty years old at the time of retirement; (2) he had completed twenty years of satisfactory service as defined in § 1332; and (3) he was not entitled to retirement pay from the armed forces under any

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[2] Plaintiff's complaint named both the Secretary of the Army and the United States Department of the Army as party defendants. The Department of the Army is not an administrative entity which Congress has authorized to be sued *eo nomine* and thus enjoys sovereign immunity from suit. *Keifer & Keifer* v. *Reconstruction Finance Co.*, 306 U.S. 381, 390 (1939). Throughout the remainder of this opinion, the term defendant will refer exclusively to the Secretary of the Army, acting in his official capacity.

[3] Fioto also served in the United States Coast Guard from 1927 to 1931. That service, however, has no bearing on his entitlement to retirement pay under the provisions of 10 U.S.C. § 1331 *et seq.*

other provision of law. Nonetheless, the Army denied his application on the ground that he failed to satisfy the proviso contained in § 1331(c), which states that any person who served in the National Guard prior to August 16, 1945, is ineligible for retirement pay unless he performed active duty during World War I, World War II, or the Korean War.[4]

Claiming that § 1331(c) was never intended to disqualify an individual who had served a complete term of twenty years following 1947, plaintiff renewed his application on February 21, 1974. This second effort was rejected as well by the Army on the basis of Fioto's pre-1945 service. Appeal to the Army Board for Correction of Military Records in June 1974 proved unavailing and no administrative remedies remain to be exhausted. At the time that plaintiff's complaint was filed in January 1975, his accrued benefits totalled slightly less than $8,000.

Defendant concedes that the mandamus statute, 28 U.S.C. § 1361, provides this court with a jurisdictional basis for granting Fioto the relief which he

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[4] Section 1331(c) provides:

> No person who, before August 16, 1945, was a Reserve of an armed force, or a member of the Army without component or other category covered by section 1332 (a) (1) of this title except a regular component, is eligible for retired pay under this chapter, unless he performed active duty after April 5, 1917, and before November 12, 1918, or after September 8, 1940, and before January 1, 1947, or unless he performed active duty (other than for training) after June 26, 1950 and before July 28, 1953.

requests. See *National Treasury Employees Union* v. *Nixon*, 492 F.2d 587, 602-603 (D.C. Cir. 1974). But relying principally on *Carter* v. *Seamans*, 411 F.2d 767 (5th Cir. 1969), *cert. denied*, 397 U.S. 941 (1970), the Army suggests that it is inappropriate for this court to grant mandamus as the plaintiff has an "adequate" remedy by bringing suit in the Court of Claims.

While it is true that mandamus is controlled by equitable principles, although technically a legal writ, *Whitehouse* v. *Illinois Central R. Co.*, 349 U.S. 366, 373 (1955), we disagree with the defendant that equity requires dismissal of the plaintiff's complaint. First, it is far from certain that Fioto's remedy in the Court of Claims would be as "adequate" as the Army asserts. In *Lee* v. *Thorton*, 420 U.S. 139 (1975), the Supreme Court held that the Tucker Act, 28 U.S.C. 1346, did not empower a district court to enjoin the operation of an unconstitutional act of Congress, even if incident to an adjudication of a claim for money damages. There is no reason to believe that the concurrent jurisdiction of the Court of Claims under 28 U.S.C. § 1491 is any broader. See *United States* v. *Sherwood*, 312 U.S. 584, 590-91 (1941). This is especially so since the Tucker Act does not confer general equitable powers upon the Court of Claims. *United States* v. *King*, 395 U.S. 1 (1969). Congress, in a 1972 amendment to 28 U.S.C. 1491, did authorize the Court of Claims, "as an incident of and collateral to any [money] judgment," to "issue orders directing . . . placement in appropriate

duty or retirement status." However, Congress has not, at least explicitly, conferred upon the Court of Claims the authority to void an unconstitutional statute. *Carter* v. *Seamans*, *supra*, did not involve such a request for relief.

Second, and more importantly, Fioto has already encountered nine years of unjustifiable delay in securing the retirement pay to which we today hold he was clearly entitled. Under these circumstances, it would be a manifest inquity to send him to another court to suffer another, inevitable period of delay.

It is agreed that if plaintiff's service in the National Guard had been limited to the years 1947 to 1967, he would now be receiving retirement pay. The Army, however, insists that Fioto's earlier service from 1933 to 1940 bars him from all benefits under the "express statutory language" of § 1331(c). *Mayer* v. *United States*, 201 Ct.Cl. 105, 112 (1973). Thus, in effect if not in intent, Fioto is being penalized for having devoted seven additional years to the service of his country. This result bears no rational relationship to the legislative objectives which led to the enactment of Title III of the Army and Air Force Vitalization and Retirement Equalization Act of 1948. Accordingly, we hold that as applied to plaintiff and the other members of his class, § 1331(c) violates the minimum requirements imposed by the Equal Protection Clause.[5] *E.g.*, *Johnson* v. *Robison*, 415

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[5] As a suit against a federal officer, this action must, of course, rely on the Fifth Amendment's Due Process Clause. But, "if a classification would be invalid under the Equal

U.S. at 374; *Department of Agriculture* v. *Moreno*, 413 U.S. 528 (1973).

A review of the legislative history of Title III plainly reveals that Congress hoped to limit the anticipated post-war exodus from the Reserves and National Guard by providing retirement pay to those who had satisfactorily served for twenty years, thus creating an incentive to continued service. See generally, U.S. Code Congressional Service, 1948, Vol. 2, p. 2161. Yet, as defendant has construed § 1331(c) it creates a disincentive to the one group whose service would have been most valuable in 1948—those with previous experience gained in the years prior to World War II.

The Army correctly points out that the Senate was concerned with the potential cost of the program as initially drafted in the House. But that concern did not, as the Army contends, lead Congress to create a purely arbitrary distinction between those who had served pre-1945 and those who had not. Rather, at the Senate's insistence, Congress adopted the reasonable requirement that an individual serve twenty "satisfactory" years, as measured by an objective standard.[6] Since it was impossible retroactively to

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Protection Clause of the Fourteenth Amendment, it is also inconsistent with the due process requirement of the Fifth Amendment." *Johnson* v. *Robison*, 415 U.S. 361, 364 n.4 (1975); *Bolling* v. *Sharpe*, 347 U.S. 497 (1954).

[6] The objective standard chosen by Congress is set forth in 10 U.S.C. § 1332. In order to qualify for retirement pay, a Reservist or National Guardsman must complete twenty years of service, in each of which he has amassed at least 50 credit

grade the quality of the services rendered prior to World War II, Congress sought to discount those years in determining whether a National Guardsman or Reservist had reached the requisite twenty-year total. An understandable exception was provided for those who had seen active duty during one of the world wars.

Pre-1940 service was thus made a nullity for the purposes of retirement pay. There is simply no evidence in the legislative history that Congress intended that any pre-1940 service would create a perpetual bar to future benefits. Indeed, testimony at the Senate hearings made plain that by remaining in the National Guard an individual could achieve his twenty year total despite the presence of some years in which he failed to meet the 50 point requirement. "He would get credit for the points if he ultimately got twenty years of service." Hearings before Committee of Armed Services, U.S. Senate, 80th Cong. 2d Sess. June 8, 1948 at p. 70. There is no dispute that plaintiff has served his twenty satisfactory years commencing with 1947.

As the government admitted during oral argument, the most reasonable assumption in the instant case is that Congress simply never anticipated a situation such as Fioto's. We need not and should

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points. Points are awarded on the following basis: fifteen points a year for membership in the Reserves or National Guard and one point for each day of active duty, annual training, attendance at a prescribed course of instruction or attendance at drills. 10 U.S.C. § 1332(a)(2).

not defer to the Army's construction of § 1331(c) when that construction is at odds with Congress' clear purposes and goals in enacting the statutory scheme of which § 1331(c) is just a part.

We therefore grant Fioto's motion for summary judgment, direct that he henceforth be placed on the Army's retirement rolls, and order that he immediately receive any and all retirement benefits which have accrued since his honorable discharge and which have been unlawfully denied him as a result of the Army's erroneous ruling. We also direct the Secretary to place all others in Fioto's class on the Army's retirement rolls and grant them retirement benefits accordingly. The defendant's cross-motion for summary judgment is correspondingly denied.

So ordered.

Dated: New York, N.Y. January —, 1976.

J. EDWARD LUMBARD
United States Circuit Judge

/s/ Walter Bruchhausen
WALTER BRUCHHAUSEN
United States District Judge

HENRY BRAMWELL
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. 75 C 44

[Filed Jan. 26, 1976, U.S. District Court, E.D.N.Y.]

LOUIS J. FIOTO, on behalf of himself and all other persons, similarly situated, PLAINTIFFS

—against—

UNITED STATES DEPARTMENT OF THE ARMY, HOWARD CALLAWAY, as Secretary of the Army, DEFENDANTS

The following insertion is to be added to footnote 1 of the opinion in the above-captioned case:

> The class, as defined in plaintiff's motion to the district court dated June 4, 1975, consists of all "persons at least 60 years of age who have performed 20 years of service computed under 10 U.S.C. § 1332 since August 16, 1945 and otherwise are entitled to retired pay for non-regular military service, except that before August 16, 1945 they were a Reserve of an armed force or a member of the Army without component and did not perform active duty after April 15, 1917 but before November 12, 1918, or after September 8, 1940 and before January 1, 1947, or after June 26, 1950 but before July 28, 1953, and therefore were disqualified from Retired Pay Benefits by virtue of 10 U.S.C. § 1331(c)."

Also, page 5, lines 26 and 28: "pre-1940" should read "pre-1945."

Dated: January 23, 1976.

/s/ J. Edward Lumbard
J. EDWARD LUMBARD
United States Circuit Judge

/s/ Walter Bruchhausen
WALTER BRUCHHAUSEN
United States District Judge

/s/ Henry Bramwell
HENRY BRAMWELL
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. 75 C 44

[Filed Jan. 26, 1976, U.S. District Court, E.D.N.Y.]

LOUIS J. FIOTO, on behalf of himself and all other persons, similarly situated, PLAINTIFFS

—against—

UNITED STATES DEPARTMENT OF THE ARMY, HOWARD CALLAWAY, as Secretary of the Army, DEFENDANTS

JUDGMENT

This action on behalf of the plaintiff and all others similarly situated, challenging the constitutionality of 10 U.S.C. § 1331(c), came on for hearing before a three-judge court consisting of the Honorable J. Edward Lumbard, United States Circuit Judge, the Honorable Henry Bramwell, United States District Judge, the Honorable Walter Bruchhausen, United States District Judge, and a decision of the Court having been duly rendered and an opinion and order having been filed, granting plaintiffs' motion for summary judgment and denying defendants' cross-motion for summary judgment, it is

ORDERED and ADJUDGED that plaintiffs' motion for summary judgment is granted; and it is further

ORDERED and ADJUDGED that plaintiff henceforth be placed on the Army's retirement rolls and that he immediately receive any and all retirement benefits which have accrued since his honorable discharge and which have been denied him under the Army's erroneous ruling; and it is further

ORDERED and ADJUDGED that the Secretary of the Army place all others in plaintiff Fioto's class on the Army retirement rolls and grant them retirement benefits accordingly; and it is further

ORDERED and ADJUDGED that defendants' cross-motion for summary judgment is denied

Dated: Brooklyn, New York January 23, 1976

/s/ Lewis Orgel
Clerk

Approved:

/s/ J. Edward Lumbard
United States Circuit Judge

/s/ Walter Bruchhausen
United States District Judge

/s/ Henry Bramwell
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. 75 C 44

LOUIS J. FIOTO, on behalf of himself and all other persons, similarly situated, PLAINTIFFS

—against—

UNITED STATES DEPARTMENT OF THE ARMY, HOWARD CALLAWAY, as Secretary of the Army, DEFENDANTS

NOTICE OF APPEAL

Notice is hereby given that the defendant Secretary of the Army, hereby appeals to the Supreme Court of the United States, pursuant to 28 U.S.C. §§ 1252, 1253 and 2101, from the judgment entered in this action on January 26, 1976, by the three-judge District Court convened herein.

Dated at Brooklyn, New York this 25th day of February, 1976

DAVID G. TRAGER
United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201
Attorney for the defendant
Secretary of the Army

By: /s/ Paul B. Bergman
Assistant U.S. Attorney
Chief, Appeals Division

TO:

DAVID GOLDFARB, ESQ.
Attorney for Plaintiffs
The Legal Aid Society
Staten Island Neighborhood Office
42 Richmond Terrace
Staten Island, New York

A TRUE COPY
ATTEST

Dated Feb. 25, 1976
LEWIS ORGEL
Clerk

By /s/ Marilyn Glenn
Deputy Clerk

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